Office Supreme Court, U.S.
FILED
JUN 11 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 1090

UNITED STATES OF AMERICA,

Plaintiff-Appellee

AGAINST

MAX BLUM,

Defendant-Appellant

PETITIONER'S REPLY BRIEF

BENJAMIN SIET,
Counsel of Record for Petitioner,
No. 29 Broadway,
New York 6, New York,
Tel. No. BO-9-5759

LODGE APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1090

UNITED STATES OF AMERICA,
Plaintiff-Appellee

AGAINST

MAX BLUM,
Defendant-Appellant

PETITIONER'S REPLY BRIEF

The petitioner intends to limit this reply brief to consider the question urged by the petitioner (page 20 of Petition for a Writ of Certiorari) that there was a complete failure of proof of the petitioner's guilt even if the circumstantial evidence submitted is taken at its face value.

The reason petitioner is constrained to discuss this question is that it was not answered by the Trial Court, nor by the Circuit Court of Appeals, and the brief for the United States in opposition does not attempt to answer it.

The Government's entire case was predicated upon the admittedly novel, negative, theory characterized by the Government as the "footprint" theory that if the unsymboled Swiss Watch Movements involved herein had

lawfully entered the United States there would be a record of such import.

There was no direct evidence that watch movements had been smuggled into the United States.

To establish illegal possession, the Government, therefore, had the burden of proving the following:

1. That there was no record in any of the ports of entry, of the legal importation of watches of the same description during the applicable period.

2. That watches of the same description could not have been acquired through the purchase thereof at any of the public auction sales conducted in the United States by the respective Custom Services during the applicable period.

The Government, by circumstantial evidence, did attempt to prove that there was no record of legal importation of unsymboled Swiss Watches of the same description.

However, the Government failed to introduce proof that unsymboled Swiss Watch Movements of the same description had not been sold at public auction by any of the respective Custom Services. The Government further failed to prove that watches which are sold at Custom auctions are necessarily imported through custom. The proof was to the contrary, e.g.: that watch and watch movements so sold at auction are smuggled watch movements which had not cleared customs.

The record is replete with the uncontradicted testimony of Government witnesses, elicited during cross-examination, and direct testimony of petitioner's witnesses, that smuggled unsymboled Swiss Watch Move-

ments which have not legally entered at any Port, are seized and sold in large quantities at public auctions, by the respective Custom Services (30A, 31A).

It was further uncontradicted that anyone could attend said auction sales, purchasers thereof acquiring good and transferable title. That these watch movements may thereafter be re-sold, and neither the seller nor the purchaser, nor anyone in possession thereof would be guilty of any illegal act.

Agent Zamosky testified that after the United States Custom Services seize smuggled unsymboled Swiss Watch Movements, they are sold in large quantities at public auction. That any person may purchase these watches at said public auctions (30A).

He further testified that there is no way to determine whether the watch movements in the case at bar had been purchased at any auction sale conducted by the United States Custom Services (30A, 31A).

That the petitioner attempted to show, but was precluded, that 20,850 unsymboled watch movements had been seized by the United States Custom Service as smuggled merchandise and had been sold at public auction in Los Angeles, California in 1960.

The Circuit Court of Appeals for the Second Circuit in its opinion completely overlooked the import of petitioner's argument that the Government had to establish that watches of the same description had not been sold at public auction by any of the Custom Services during the applicable period. The Court there said:

> "Appellant sought to show that there had been a customs auction in Los Angeles of illegally imported Swiss Watch Movements. This did not,

however, reflect upon the government's proof as to non-importation of 'Altair' watches of the type seized here."

The Government failed to submit any proof whatsoever that "Altair" watches of the type found in petitioner's possession had not been sold by Custom Service at public auction. As a matter of fact, the petitioner attempted to prove and was precluded from showing that a vast quantity of Swiss Watch Movements had been seized for violation of Custom Law and had been sold at public auction in Los Angeles, California in the year 1970.

The most cogent and compelling reason why this conviction should be reversed is best illustrated by the destiny of the very watch movements in this case which were seized by Customs when the petitioner was arrested. These watches were subsequently libeled, and will eventually be sold at a custom auction sale. If this conviction is affirmed, then obviously there is no record of any legal importation thereof. If the Government is not required to produce records of auction sales, then anyone in possession thereof even though stemming from the lawful purchase at Custom auction may nonetheless be charged with, and convicted of, illegal possession thereof.

Can we now hold that a purchaser of these same Swiss Watch Movements could again be convicted by the same testimony which the Government adduced at this trial which they now claim is sufficient to convict the petitioner.

In urging this argument in the reply brief the petitioner also again respectfully urges that this Honorable Court consider the arguments presented in the Petition for a Writ of Certiorari and in his brief submitted to the Circuit Court of Appeals for the Second Circuit.

The petitioner's conviction based as it is upon the dangerous concept of negative circumstantial evidence and the novel theory of "footprint" records which substantively failed to prove petitioner's guilt, is a deprivation of his Constitutional rights of due process of law.

WHEREFORE, petitioner respectfully prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

BENJAMIN SIET,
Counsel of Record for Petitioner,
No. 29 Broadway,
New York 6, New York.